No. 08-1182

IN THE

Supreme Court of the United States

WILMINGTON HOSPITALITY, LLC,
Petitioner,

v.

NEW CASTLE COUNTY,
Respondent.

Petition for a Writ of Certiorari to the Delaware Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. With respect to the equal protection claim:

a. Did the Delaware Supreme Court correctly determine that Petitioner had failed to prove that it was similarly situated to other landowners, especially when, unlike all the identified comparators, Petitioner had acted in bad faith by intentionally building a hotel substantially larger than authorized, and by otherwise ignoring Building Code restrictions?

b. Was there an alternative, independent basis for the Delaware Supreme Court's rejection of Petitioner's claim when Petitioner failed to prove that Respondent lacked a rational basis for the actions of which Petitioner complains?

2. Did the Delaware Supreme Court err in ruling that a jury could not find that the evidence that Petitioner introduced was sufficient to establish that Respondent had acted arbitrarily or irrationally?

3. Does this Court have jurisdiction to hear a claim that the trial court erred, based on a substantive argument different from the argument made below, in denying a motion to amend a complaint, pursuant to Delaware procedural rules?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RESPONDENT'S BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	1
I. In reversing the Superior Court, the Delaware Supreme Court applied the appropriate standard to determine whether there were similarly situated comparators and also reversed the Superior Court on the independent ground that there was insufficient evidence to support a finding that the Respondent County lacked a rational basis for its actions.	4
II. The Delaware Supreme Court did not rule that evidence of the Respondent County's overall treatment of Petitioner WH was inadmissible or irrelevant to the equal protection claim, but only that it was insufficient to establish arbitrary conduct by the County.	8
III. Petitioner WH has raised a different issue before this Court with respect to whether it should have been permitted to amend its complaint, under Delaware procedural rules, than the partial takings issue it raised on its motion in the trial court.	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001)	5-6
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999)	9
Cordi-Allen v. Conlon, 494 F.3d 245 (1st Cir. 2007)	6
Purze v. Village of Winthrop Harbor, 286 F.3d 452 (7th Cir. 2002)	5, 6
Village of Willowbrook v. Olech, 528 U.S. 562 (2000)	*passim*
Williams v. Vermont, 472 U.S. 14 (1985)	5-6

STATUTES	
42 U.S.C. § 1983	3, 9

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STATEMENT OF THE CASE

In April 1990, the predecessor to Petitioner, Wilmington Hospitality, LLC ("WH"), obtained approval from Respondent, New Castle County, for a record plan authorizing it to build a hotel 118,805 square feet in size. App. 58a.[1] WH's architect designed a

[1] The Appendix to Wilmington Hospitality's Petition is referred to as App._____. The opinion of the Delaware Supreme Court, which Petitioner asks this Court to review, is set forth at pp. 56a-68a of that Appendix. All record citations in this Brief in Opposition are taken from that opinion, except whereas otherwise specifically noted. By contrast, most of Petitioner's citations to the record come from its appendix filed in the Delaware Supreme Court. See note 2 at p.3 of the Petition and pp. 2-24, *passim*. Many of these "facts" were not

hotel that was substantially larger than the record plan authorized. *Id.* The project was delayed for several years, and in 1998 WH applied for and obtained a building permit from the County for a 155,480 square foot hotel. *Id.*

In May 2000, County inspectors determined that the nearly-completed hotel was inconsistent with the record plan in several ways: It was larger than authorized. It contained banquet halls, meeting rooms, and other facilities that would necessitate additional parking. It included a kitchen for which no building permit had been issued. *Id.* The County revoked the building permit as a result of this discovery. *Id.*

WH applied to the County Board of Adjustment for nine variances, which, if granted, would have allowed it to obtain the certificate of occupancy necessary to open the hotel. App. 59a. After a two-day hearing, the Board denied the variances. *Id.* The Board's factual findings and legal conclusions, which the Delaware Supreme Court found were supported by the evidence, included a finding that WH knew it was overbuilding and acted in bad faith. App. 63a-64a, 67a-68a.[2] WH noticed an appeal in the Delaware Superior Court of the Board's decision denying the

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adopted by the Delaware Supreme Court. For example, the court relied on the fact that the Board of Adjustment rejected WH's application for variances. App. 59a, 63a-64a, 67a-68a. The Petition cites to the testimony of the one member of the Board who dissented from that decision. Pet. at 9-10. The court never mentioned and apparently attached no significance to this dissenting view.

[2] The Board of Adjustment's Notice of Decision is set forth at App. 69a-92a. The Board's discussion of WH's bad faith is found at pp. 84a-86a of that Notice of Decision.

variances. App. 59a. WH also filed an action in the Delaware Court of Chancery seeking a mandatory injunction compelling the County to issue a certificate of occupancy. *Id.* The Court of Chancery denied WH's motions for a temporary restraining order and for a preliminary injunction. *Id.* It set the case for a trial on the merits for November 28, 2000, but the day before the trial WH notified the court that it was not ready to proceed. App. 59a-60a. It never prosecuted the Chancery action, which was ultimately dismissed. App. 60a. WH also abandoned its appeal in Superior Court of the Board's denial of the variances and presented no evidence questioning the Board's fairness or impartiality. App. 68a.

In 2003 WH filed an action in Delaware Superior Court against the County alleging 42 U.S.C. § 1983 violations of substantive due process and equal protection, a taking without just compensation (inverse condemnation), and breach of contract. App. 61a.[3] The Superior Court dismissed the substantive due process and inverse condemnation claims. *Id.* WH then sought to amend its complaint to allege a temporary or partial taking by the County. Its motion was denied. App. 61a-62a. At trial the jury found for the County on the breach of contract claim but awarded WH $7.5 million in damages on its equal protection claim. App. 62a.

The County appealed to the Delaware Supreme Court, which reversed the Superior Court verdict on the equal protection claim on two independent grounds. WH's equal protection claim was a "class of

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[3] Prior to filing that action, WH brought a similar action in the United States District Court for the Eastern District of Pennsylvania, which dismissed the complaint on the County's motion. Mem. Op. of the Super. Ct. (Aug. 4, 2004), App. 5a-6a.

one" claim arising from this Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Delaware Supreme Court interpreted *Olech* as requiring two necessary elements that WH would have to prove to establish an equal protection claim: (1) that there were land owners similarly situated to WH who were treated differently, and (2) that the County had no rational basis to treat WH as it did. App. 62a. The court held that WH had failed as a matter of law to prove that there were similarly situated comparators. App. 63a-67a. It further held that WH had failed to prove the second element, that the County had no rational basis for its actions. App. 67a-68a. WH also cross-appealed the Superior Court's denial of its motion to amend its complaint to state a partial takings claim. The Delaware Supreme Court summarily rejected this cross-appeal and affirmed the Superior Court. App. 68a.[4]

REASONS FOR DENYING THE PETITION

I. In reversing the Superior Court, the Delaware Supreme Court applied the appropriate standard to determine whether there were similarly situated comparators and also reversed the Superior Court on the independent ground that there was insufficient evidence to support a finding that the Respondent County lacked a rational basis for its actions.

a. WH has sought to manufacture a certiorari-worthy issue by asserting a difference between this

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[4] Although not raised by WH in its Petition, the Delaware Supreme Court also summarily denied WH's cross-appeal of the Superior Court's dismissal of its substantive due process and inverse condemnation claims. App. 68a.

Court's "similarly situated" language in *Olech*, 528 U.S. at 564, and language quoted by the Delaware Supreme Court from *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002), which equates "similarly situated" comparators with comparators that are "*prima facie* identical in all relevant respects." As the Delaware Supreme Court noted, these are simply two different ways of saying the same thing. App. 62a. The Seventh Circuit's "*prima facie* identical in all relevant respects" is a sensible explanation of "similarly situated." In *Olech*, the claim was that Mrs. Olech was required to give the village a 33-foot easement in order to be connected to the municipal water supply, while all other property owners were required to give only a 15-foot easement. *Olech*, 528 U.S. at 563. Undoubtedly these other property owners and their properties differed from Mrs. Olech and her property in many respects, but in the relevant respect of seeking to connect to the water supply, they were essentially identical.

WH cites this Court's opinion in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and in *Williams v. Vermont*, 472 U.S. 14 (1985), to support its position that "similarly situated" means something different than "*prima facie* identical in all relevant respects." Pet. at 25-27. But this Court's language in *Garrett*, which WH cites with approval to support its position, is very similar to the language WH eschews: "similarly situated in relevant respects." 531 U.S. at 366 n.4.[5] The

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[5] *Garrett* has little, if anything, to do with this case. It held that state employees are prohibited by the Eleventh Amendment from recovering money damages by reason of a state's failure to comply with the Americans with Disabilities Act. WH

language in *Williams*, of which WH approves, is also quite similar: "similarly situated for all relevant purposes." 472 U.S. at 23. Further, while the Delaware Supreme Court did quote the "prima facie identical" language from *Purze*, WH argues that the court actually applied a pre-*Olech* standard of "identically situated in all relevant respects rationally related to the government's mission." Pet. at 26 (quoting *Purze*, 286 F.3d at 455). Even assuming this is different from the *Olech* standard, it is not the standard that the Delaware Supreme Court applied; at no place in its opinion did the court cite this language.

In fact the Delaware Supreme Court only quoted the *Purze* language, "*prima facie* identical in all relevant respects," once in its opinion (App. 62a) and equated it with "similarly situated" and with "an extremely high degree of similarly," quoting *Cordi-Alien v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007). These formulations do not constitute different standards, but are simply different ways of conveying the concept that an equal protection claim, in the absence of a suspect classification, requires a high degree of similarity, particularly among property owners who are allegedly the recipients of different treatment in zoning or land use decisions. Such decisions are an appropriate exercise of governmental discretion and are difficult to compare because properties—at different locations and of different sizes—differ. Unless courts and juries are going to routinely second-guess executive branch zoning decisions and decisions on the permitted uses of land, equal protection review is generally inappropriate. Accordingly, the barriers to

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cites to language in a footnote to *Garrett*, describing a ruling in another case applying the basic principles of rational review. Pet. at 26-27.

such review are purposefully high. Zoning and land use decisions are a proper exercise of the authority of the executive branch and not matters for judicial review under equal protection analysis except in the most egregious cases.

In this case, under the most lenient standard of similarity, there was no identified land owner similarly situated to WH. WH's first argument or reason for granting its Petition ignores a unique aspect of this case that the Delaware Supreme Court found to be dispositive as to the "similarly situated" question: WH's bad faith. In explaining why WH failed to prove there were similarly situated comparators, the Delaware Supreme Court wrote, "The Board [of Adjustment] found, based on documents and testimony of numerous witnesses, that WH did not act in good faith" in building a hotel substantially larger than was authorized by the record plan. App. 63a-64a. Although there were many other factors that prevented the comparators from being similarly situated to WH, they need not be considered because none of the alleged comparators acted in bad faith. App. 66a-67a. Under any test that might be applied, there were no similarly situated comparators.

b. The Delaware Supreme Court had an alternative, independent ground for its ruling: Even if the comparators were similarly situated, WH produced insufficient evidence for a jury to conclude that the County lacked a rational basis for its actions. App. 67a-68a. The court ruled that the Board of Adjustment "denied WH's application for variances based on factual findings and legal conclusions supported by the evidence, including a finding that WH knew it was overbuilding and acted in bad faith." App. 67a-68a. Thus the Board had a rational basis to

deny the variances. WH noticed but then abandoned an appeal from the Board's decision, leaving that decision as final and unchallenged. Aside from the Board's decision, the court found that the other conduct of which WH complained in its equal protection claim, the County's (as opposed to the Board's) refusal to cooperate with it to open the over-built hotel, also had a rational basis.

> The County was under no obligation, to assist WH in working its way out of this self-created dilemma. From the County's perspective, WH had tried to "get away" with ignoring the [Building] Code, and it was not going to help WH by making concessions or granting temporary [certificates of occupancy].

App. 68a.

In sum, there was an alternative, independent ground for the Delaware Supreme Court's rejection of WH's equal protection claim: Its failure to produce evidence sufficient to show the absence of a rational basis for the County's actions. Even if WH were correct with respect to its argument about the "similarly situated" test, the result in this case would be the same. Its equal protection claim could not withstand summary judgment.

II. The Delaware Supreme Court did not rule that evidence of the Respondent County's overall treatment of Petitioner WH was inadmissible or irrelevant to the equal protection claim, but only that it was insufficient to establish arbitrary conduct by the County.

WH's second argument or reason for granting the Petition distorts a ruling on sufficiency of the evi-

dence into an issue of admissibility. The caption for this second argument (Pet. at 28) would lead the reader to believe that the Delaware Supreme Court had ruled that evidence of the County's overall treatment of WH should be excluded from evidence. In support of its position, WH cites *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), a case that primarily concerns the Seventh Amendment right to a jury trial in a § 1983 action asserting a regulatory takings claim. *Del Monte Dunes* was not an equal protection opinion; although the plaintiff had presented an equal protection claim, the Court of Appeals, and this Court, did not address that claim. *Id.* at 701-702. This Court did rule that it was proper to submit to the jury in a takings case the question whether the city's decision to deny a developer's final proposal was reasonably related to the city's proffered justifications. *Id.* at 706.

WH asserts that the Delaware Supreme Court's ruling was that evidence of the County's conduct was irrelevant once the Board of Adjustment had determined that WH had acted in bad faith and that, therefore, the jury would be precluded from considering that conduct. Pet. at 29. The Delaware Supreme Court opinion at no place discusses the admissibility of evidence relevant to allegations that a government has behaved arbitrarily or irrationally. What the court did rule was that after WH acted in bad faith to build a hotel substantially larger than was authorized, as a matter of law a jury could not find that the specific evidence which WH produced—refusing to assist and opposing WH's opening the hotel—established arbitrary or irrational conduct. App. 67a. A jury could not rationally find that it was arbitrary for the County, faced with a developer who "had tried to 'get away' with ignoring the [Building] Code," as the

Board of Adjustment had found, (1) to insist either that WH bring the building into compliance or sell the hotel to an untainted owner; (2) not to help WH work its way out of its self-created dilemma; or (3) not to help WH by making concessions or granting temporary certificates of occupancy. App. 68a.

The court specifically found that in the context of a bad faith developer, a jury could not find that there was sufficient evidence of irrational or arbitrary conduct based on (1) the County Executives expression of his dislike for WH's principals; (2) the County's insistence that WH either tear down or foam in the top two floors of the hotel to bring it into compliance with the Code; or (3) the County's insistence that if the hotel were sold, safeguards be in place to ensure that the principals of WH and their families did not retain any interest in the hotel, thereby benefiting from their bad faith conduct App. 67a. The court said nothing about whether evidence to support these factual allegations should have been admitted in this case or in future cases. Rather it said that the evidence that was admitted in this case was insufficient to establish that the County had no rational basis for its conduct. App. 67a-68a.

This is a highly fact-specific ruling on summary judgment that has little or no implications for other cases. It does not establish any standard of admissibility or limit the jury's consideration of the evidence. It simply holds that in this factual context, summary judgment should have been granted because no rational finder of fact could conclude that the County acted arbitrarily. App. 68a.[6]

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[6] WH also argues that because the Delaware Supreme Court relied on WH's bad faith in rejecting its arbitrary conduct

III. Petitioner WH has raised a different issue before this Court with respect to whether it should have been permitted to amend its complaint, under Delaware procedural rules, than the partial takings issue it raised on its motion in the trial court.

WH's last reason in support of its Petition is based on the Delaware Superior Court's denial of its motion seeking leave to amend the complaint to state a partial takings claim after its intial inverse condemnation claim had been dismissed—an argument so unsubstantial that the Delaware Supreme Court summarily rejected it. App. 68a. Because the Delaware Supreme Court did not discuss the issue, in order to understand why this motion to amend was denied, it is necessary to refer to a ruling of the Delaware Superior Court, the trial court. That court's Memorandum Opinion of May 24, 2005 (App. 20a-27a) reveals that the issue that WH seeks to raise before this Court is not the issue that was ruled on by the Superior Court when it denied the motion for leave to amend.

Before this Court, WH now claims that the alleged taking was the County's insistence that opening the hotel be conditioned upon a deed restriction or some other provision prohibiting WH's principals and their families from having any ownership in the hotel for

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contention as well as its similarly situated contention, it conflated the two prongs of the *Olech* analysis. (Pet. at 29.) To the contrary, WH's bad faith conduct is relevant to both prongs. Because it alone acted in bad faith, there was no other landowner that was similarly situated. Moreover, because it had deliberately tried to "get away" with not complying with restrictions in the record plan, the County did not act arbitrarily in opposing its opening the hotel. App. 68a.

20 years. The Superior Court's Memorandum Opinion at no place even mentions the proposed deed restriction or other impairment on the ownership rights of the principals and their families. Rather, the Superior Court characterized WH's position in support of its motion to amend thusly:

> WH now seeks to assert the alternative theories of recovery . . . based upon [the County's] interference with WH's reasonable investment-backed expectations and the character of [the County's] actions.

App. 24a.

The Memorandum Opinion then goes on to specify three governmental acts that WH put in issue in seeking to amend its complaint, none of which are restrictions on future ownership: (1) the initial denial of a certificate of occupancy; (2) the Board of Adjustments' denial of nine variances; and (3) the County's denial of a renewed request for a certificate of occupancy to open a portion of the hotel. App. 24a-25a. In contrast, WH's Petition to this Court states that the issue is "whether the government's *ownership ban* constitutes a regulatory taking." Pet. at 34 (emphasis added).

In sum, WH is seeking to raise a new argument in this Court, not considered with respect to the subject Motion to Amend by the trial court or by the Delaware Supreme Court. This issue arises in the context of a denial of a motion to amend the complaint, a matter of Delaware procedure raising no federal issue. Nothing here warrants the consideration of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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